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IN THE
COURT OF APPEALS OF INDIANA

DARRELL BURTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0706-CR-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane W. Miller, Judge
Cause No. 71D01-0402-FA-16

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Darrel Burton appeals his conviction for dealing in cocaine as a class A felony.[1] Burton raises one issue, which we restate as whether the evidence is sufficient to sustain his conviction for dealing in cocaine. On cross appeal, the State raises one issue, which we revise and restate as whether the trial court erred in failing to sentence Burton on his conviction for resisting law enforcement as a class D felony.[2] We affirm and remand.[3]

The relevant facts follow. On February 12, 2004, St. Joseph County Police Department Officers Andrew James Taghon and Ryan Huston were patrolling the northwest side of South Bend in an unmarked vehicle when they spotted Burton, whom they recognized from prior dealings, driving in the opposite direction. Officers Taghon

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[1] Ind. Code § 35-48-4-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 22 (eff. July 1, 2006)).

[2] Ind. Code § 35-44-3-3 (2004) (subsequently amended by Pub. L. No. 143-2006, § 2 (eff. July 1, 2006)).

[3] A copy of the presentence investigation report on white paper is located in the appellant's appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

and Huston turned their vehicle around and, as they followed Burton, "did an inquiry" on his vehicle's registration, which revealed that there was an active warrant for Burton's arrest. Transcript at 10. The officers activated their emergency lights and conducted a traffic stop. As they exited their vehicle and began to approach, Burton threw a "silver small object" out of the passenger window. Id. at 28 Burton then sped away, and Officers Taghon and Huston returned to their vehicle, activated their emergency lights and siren, and pursued him. Burton traveled at a high rate of speed for a few blocks, running stop signs and continuing to throw items out of the window. Burton then stopped the vehicle, exited, and surrendered to the officers, who arrested him. When they asked Burton why he fled from them, Burton responded that he "knew [he] had dope in the car." Id. at 30.

In Burton's vehicle, the officers found several baggies containing cocaine residue and, inside a bag behind the passenger seat, several baggies containing cocaine. A canine unit retrieved the items, which were also determined to be baggies of cocaine, that Burton had thrown from the vehicle while fleeing. In all, the officers found "38 to 40 grams" of cocaine. Id. at 60. The object Burton had initially thrown from the vehicle was a digital scale. The police also found $562 dollars hidden in a glove in Burton's glove compartment.

The State charged Burton with dealing in cocaine as a class A felony and resisting law enforcement as a class D felony. At a bench trial on March 2, 2006, Burton testified that, just before the officers spotted him, he had dropped off two passengers who had been in his vehicle. He claimed that, when the officers pulled him over, he "didn't see

any lights flashing" and thought he might be in danger because he "had a large amount of money" in his possession. Id. at 94. After handing the officers a "duplicate license," Burton admittedly "took off," but denied that he had thrown anything out of his vehicle or told the officers that he had "dope in the car." Id. at 96. He claimed not to have known that there was cocaine in the vehicle. The trial court entered judgment of conviction on both counts and set a date for the sentencing hearing. After several continuances, on April 11, 2007, the court sentenced Burton to the Indiana Department of Correction for a term of thirty years with ten years suspended and ten years on probation for the dealing in cocaine conviction.

The issue is whether the evidence is sufficient to sustain Burton's conviction for dealing in cocaine. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Ind. Code § 35-48-4-1 provides that "[a] person who . . . possesses, with intent to . . . deliver . . . cocaine . . . pure or adulterated . . . commits dealing in cocaine . . . a Class B felony." The offense is a class A felony if the amount of cocaine "involved weighs three (3) grams or more . . . ." Ind. Code § 35-48-4-1(b). Thus, to convict Burton of dealing in cocaine as a class A felony, the State needed to prove that Burton possessed

with the intent to deliver cocaine, pure or adulterated, and that the amount of cocaine involved weighed three grams or more.

Burton argues that he did not have actual possession of the cocaine because it "was not found on [him]." Appellant's Brief at 4. Actual possession of contraband occurs when a person has direct physical control over the item. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004).

Here, Officers Taghon and Huston observed Burton throwing baggies of cocaine out of the window of his vehicle as he attempted to evade the officers. Thus, Burton exerted direct physical control over the cocaine, and the trial court could properly conclude that Burton had actual possession of the cocaine.[4] See, e.g., Hayes v. State, 876 N.E.2d 373, 375-376 (Ind. Ct. App. 2007) (holding that defendant had actual possession of cocaine where police observed defendant put his closed fist in a bin, remove his empty hand, and then begin to flee, and the police later found cocaine in the bin), trans. denied. Although Burton later denied throwing the cocaine out of his vehicle, the trial court found the testimony of Officers Taghon and Huston more credible, and we cannot reweigh the evidence. See Jordan, 656 N.E.2d at 817. Given the facts of the case, we conclude that the State presented evidence of probative value from which a reasonable trier of fact could have found Burton guilty beyond a reasonable doubt of dealing in cocaine as a class A felony. See, e.g., Thompson v. State, 702 N.E.2d 1129, 1132 (Ind.

[4] Burton argues at length that he did not have constructive possession of the cocaine. However, because we conclude that the evidence supports a finding of actual possession, we need not address his argument.

Ct. App. 1998) (holding that the evidence was sufficient to support defendant's conviction for dealing in a narcotic).

The issue raised on cross appeal is whether the trial court erred in failing to sentence Burton on his conviction for resisting law enforcement.[5] The Indiana Code states that a trial court "shall fix the penalty of and sentence a person convicted of an offense." I.C. § 35-50-1-1. In light of the trial court's failure to sentence Burton on the resisting law enforcement conviction, we remand the case for the imposition of a sentence on that conviction.

For the foregoing reasons, we affirm Burton's conviction for dealing in cocaine as a class A felony and remand for the imposition of a sentence on Burton's conviction for resisting law enforcement.

Affirmed and remanded.

BARNES, J. and VAIDIK, J. concur

[5] The judgment of conviction and sentencing order recites that the trial court accepted "the plea agreement and finds the defendant guilty and enters judgment of conviction" for dealing in cocaine as a class A felony. Appellant's Appendix at 7. However, there is no copy of a plea agreement in the record, and Burton does not mention one in his appellant's brief. The trial court's initial ruling entered convictions on both the resisting law enforcement charge and the dealing in cocaine charge, and the chronological case summary likewise shows that Burton was convicted of both charges. Therefore, we agree with the State that "[t]he record . . . is clear that Burton was tried and convicted of both offenses." Appellee's Brief at 8.